

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**WEST VIRGINIA NATIONAL AUTO  
INSURANCE COMPANY, INC.,**

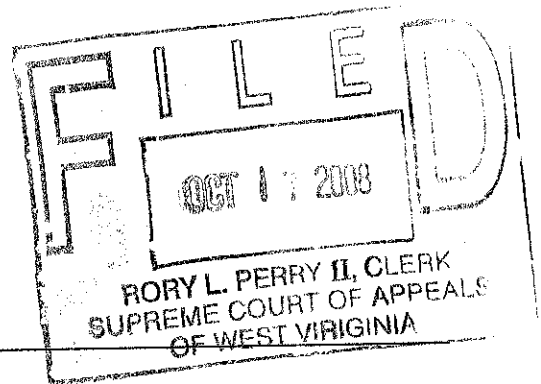
**Petitioner,**

**vs.**

**Upon Original Jurisdiction  
In Prohibition,  
No. 081711**

**THE HONORABLE THOMAS A. BEDELL,  
JUDGE OF THE CIRCUIT COURT OF  
HARRISON COUNTY, WEST VIRGINIA,  
and JOHN A. YANCHECK [sic], ESQUIRE,**

**Respondents.**



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**RESPONSE OF JOHN A. YANCHEK TO RULE TO SHOW CAUSE**

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**JOHN A. YANCHEK  
BY COUNSEL**

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### **KIND OF PROCEEDING AND NATURE OF RULING BELOW**

This is an original proceeding wherein Petitioner has sought the award of a writ of prohibition against the Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County, West Virginia, and the Defendant Below, John A. Yanchek, in Civil Action No. 07-C-517-2, on the basis that the circuit court abused its power, committed clear error, and exceeded its legitimate authority. Specifically, relief is sought from the November 17, 2007, Order Granting Defendant's Motion to Dismiss Complaint and Motion to Dismiss Cross Claims Against John A. Yanchek in Civil Action No. 07-C-517-2. After reviewing and considering Defendant, John A. Yanchek's Motion to Dismiss the Complaint, Defendant John A. Yanchek's Motion to Dismiss Cross Claim of Gulf Coast Collection Bureau, Inc., Plaintiff's and Defendant, Gulf Coast Collections Bureau, Inc.'s Responses and Defendant Yanchek's Reply thereto, and after conducting a thorough examination of the record and pertinent legal authority, the Circuit Court of Harrison County concluded that there was no factual evidence that would tend to support the allegation that Mr. Yanchek was transacting business in the State of West Virginia, and, thus, there was insufficient evidence to establish *in personam* jurisdiction over John A. Yanchek.

Five (5) months after the entry of the November 17, 2007, dismissal order, Petitioner filed Plaintiff's Motion for Reconsideration on or about April 16, 2008. In response to that motion, the trial court entered a Scheduling Order to establish a schedule for the filing of any responses and replies to the motion. In response to the motion, Respondent filed a Response to West Virginia National Auto Insurance Company's Motion for Reconsideration, and Petitioner filed its reply as set forth in the Scheduling Order. After reviewing the motion, response, and reply, and again examining the record and pertinent legal authority, the Circuit Court of Harrison

County denied Petitioner's motion in its order of May 15, 2008, concluding that there was no factual evidence that would support the allegation that Mr. Yanchek transacted business in the State of West Virginia.

More than nine (9) months from the original order dismissing John A. Yanchek and three (3) months from the order denying Petitioner's motion for reconsideration, Petitioner filed its Petition for Writ of Prohibition on August 21, 2008. On September 9, 2008, Respondent filed the Response of John A. Yanchek in Opposition to Petition for Writ of Prohibition. On September 25, 2008, this Court issued a Rule to Show Cause. The Respondent, John A. Yanchek, now submits this response as permitted by Rule 14(d) of the West Virginia Rules of Appellate Procedure.

### **STATEMENT OF FACTS**

For purposes of this present matter, the following facts, as alleged in the Complaint, are being viewed in the light most favorable to the Petitioner. A copy of the Complaint is submitted herewith as Exhibit A of the Appendix of Exhibits.

In or about November, 2003, West Virginia National Auto Insurance Company, Inc., Petitioner herein, entered into an oral agreement with Gulf Coast Collection Bureau, Inc., co-defendant below, by which West Virginia National began placing accounts with Gulf Coast Collection Bureau, for collection. During the next three and one half (3 ½) years, West Virginia National forwarded at least sixty-nine (69) accounts to Gulf Coast Collection Bureau, for collection. The sixty-nine (69) accounts forwarded to Gulf Coast Collection Bureau, had a value of five hundred seventy-nine thousand fifty eight dollars and forty-eight cents (\$579,058.48). Throughout the duration of relationship between West Virginia National and Gulf Coast

Collection Bureau, Gulf Coast Collection Bureau collected a total of ten thousand eighty nine dollars and sixty cents (\$10,089.60).

At sometime during its contractual relationship with West Virginia National, Gulf Coast Collections Bureau, a Florida corporation, forwarded approximately thirteen (13) of the sixty-nine (69) accounts to John A. Yanchek, an attorney licensed to practice law in the State of Florida and Respondent herein, for the purpose of initiating suit against the debtors. Two thousand two hundred fifty dollars (\$2250.00) was forwarded to John A. Yanchek by Gulf Coast Collection Bureau to file civil actions for debt collection on nine (9) accounts; however, no actions were filed.

Respondent was, at some point prior to the filing of the present lawsuit, contacted by counsel for Petitioner, inquiring as to the status of the accounts forwarded to him by Gulf Coast Collection Bureau. In response this request for information by Petitioner's counsel, Respondent sent a letter addressed to Michael D. Crim, Esquire, at the office of McNeer Highland McMunn & Varner, in Clarksburg, West Virginia, advising that Respondent was not admitted pro hoc vice in West Virginia and, thus, no suits had been filed. A copy of the correspondence is submitted herewith as Exhibit B of the Appendix of Exhibits. This letter to Petitioner's attorney, sent by Respondent shortly before the filing of the present lawsuit, has been the only documentation produced by Petitioner in support of its position that personal jurisdiction may be properly asserted over Respondent, other than an affidavit that was later prepared by Gulf Coast Collection Bureau following Respondent's dismissal from the underlying matter.

On or about May 2, 2007, the contract between West Virginia National and Gulf Coast Collection Bureau was terminated by West Virginia National. At the time that the contract was terminated, the statute of limitations had run on forty-five (45) of the sixty-nine (69) accounts

originally forwarded to Gulf Coast Collection. Of the thirteen (13) accounts forwarded to John A. Yanchek by Gulf Coast Collection Bureau, the statute of limitations had run on eleven (11) accounts.

On or about August 23, 2007, West Virginia National filed its Complaint against Gulf Coast Collections Bureau, and John A. Yanchek in the Circuit Court of Harrison County. Gulf Coast Collection Bureau, filed a cross-claim against Mr. Yanchek. In response to the Complaint and cross-claim, Respondent filed Defendant, John A. Yanchek's Motion to Dismiss the Complaint, and Defendant John A. Yanchek's Motion to Dismiss Cross Claim of Gulf Coast Collection Bureau, Inc., arguing that the Circuit Court of Harrison County did not have personal jurisdiction over him because he had not and could not transact business in West Virginia.

In support of his motions to dismiss, Respondent submitted an Affidavit of John A. Yanchek. A copy of the Affidavit of John A. Yanchek is submitted herewith as Exhibit C of the Appendix of Exhibits. In that affidavit, Mr. Yanchek acknowledged that, while he was licensed to practice law in Florida, he was not licensed to practice law in West Virginia. Furthermore, Mr. Yanchek admitted that he had never been admitted pro hac vice to practice law in West Virginia and did not advertise legal services in West Virginia. Mr. Yanchek also stated that he did not have any direct contact or communication with the Petitioner. Finally, Mr. Yanchek explained that the only contact he has had with regard to the State of West Virginia is limited to an occasion where he may have driven through a portion of the State while traveling to another destination.

For purposes of this present matter, the facts which must be considered to determine if the Circuit Court of Harrison County has personal jurisdiction over Respondent are essentially undisputed. Mr. Yanchek was an attorney licensed to practice law in Florida. He was forwarded

several accounts from Gulf Coast Collection Bureau, a Florida corporation. Mr. Yanchek was never admitted pro hac vice in West Virginia or otherwise admitted to practice law in West Virginia. Mr. Yanchek did not file any civil actions to recover the debts owed on the accounts forwarded to him by Gulf Coast Collection Bureau. Based on these undisputed facts, the Circuit Court of Harrison County properly concluded that it did not have personal jurisdiction over Respondent.

### **PRELIMINARY STATEMENT**

The Petitioner argues that “the circuit court abused its power, committed clear error, and exceeded its legitimate authority by granting Yanchek’s Motion to Dismiss Complaint.” Petition for Writ of Prohibition at p. 4. However, as explained herein, the Circuit Court of Harrison County properly concluded that there was no factual evidence that would tend to support the allegation that Mr. Yanchek was transacting business in the State of West Virginia, and, thus, there was insufficient evidence to establish *in personam* jurisdiction over John A. Yanchek pursuant to W. Va. Code § 56-3-33 or otherwise.

Furthermore, a writ of prohibition is not an appropriate remedy to challenge the errors allegedly committed by the Circuit Court of Harrison County. The appropriate course to be pursued to challenge the granting of a motion to dismiss based upon the absence of *in personam* jurisdiction is through the filing of a petition for appeal. Finally, the Petition for Writ of Prohibition does not satisfy the core requirements for a petition for extraordinary relief, because at least two adequate remedies at law were available to the Petitioner following the entry of the November 17, 2007, Order Granting Defendant’s Motion to Dismiss Complaint and Motion to Dismiss Cross Claims Against John A. Yanchek.

## ARGUMENT

### I.

#### **THE LOWER COURT PROPERLY CONCLUDED THAT IT DID NOT HAVE PERSONAL JURISDICTION OVER JOHN A. YANCHEK AFTER APPLYING THE TWO-PART TEST SET FORTH IN *ABBOTT V. OWENS-CORNING FIBERGLASS CORP.***

It is a fundamental rule of law that “jurisdiction cannot be asserted over a defendant which a state has no contacts, no ties and no relations.” *State ex rel. CSR Ltd. v. MacQueen*, 190 W. Va. 695, 698, 441 S.E.2d 658, 661 (1994). Moreover, as the West Virginia Supreme Court of Appeals stated in Syllabus Point 1 of *Schweppes U.S.A. Ltd. v. Kiger*, 158 W. Va. 794, 214 S.E.2d 867 (1975), “[i]n order to render a valid judgment or decree, a court must have jurisdiction both of the parties and of the subject matter and any judgment or decree rendered without such jurisdiction will be utterly void.” In this case, the lower court could not render any judgment or decree against Mr. Yanchek and properly dismissed him from the civil action because the lower court did not have personal jurisdiction over Mr. Yanchek.

In Syllabus Point 5 of *Abbott v. Owens-Corning Fiberglass Corp.*, 191 W. Va. 198, 444 S.E.2d 285 (1994), the West Virginia Supreme Court of Appeals, relying on the decision in *World-Wide Volkswagen Corp. v. Woodson*, 44 U.S. 286, 290 (1980), established a two-part analysis for determining if a circuit court has personal jurisdiction over a nonresident defendant.

A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant’s actions satisfy our personal jurisdiction statutes set forth in *W. Va. Code*, 31-1-15 [1996] and *W. Va. Code*, 56-3-33 [1996]. The second step involves determining whether the defendant’s contacts with the forum state satisfy federal due process.

Syl. Pt. 1, *Easterling v. American Optical Corp.*, 207 W. Va. 123, 529 S.E.2d 588 (2000), citing *Abbot* at Syl. Pt. 5. The first step, therefore, necessarily requires a determination that one of the actions or activities set forth in W. Va. Code § 56-3-33 has occurred. There are seven (7) such provisions in the West Virginia long arm statute, which include,

- (1) Transacting any business in this state;
- (2) Contracting to supply services or things in this state;
- (3) Causing tortious injury by an act or omission in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this state: *Provided*, That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Having an interest in, using or possessing real property in this state; or
- (7) Contracting to insure any person, property or risk located within this state at the time of contracting.

W. Va. Code § 56-3-33(a) (2008).

When a defendant makes a motion to dismiss for lack of personal jurisdiction, it is the plaintiff's burden to establish sufficient facts upon which the court may exercise jurisdiction over the defendant; thus, the party asserting jurisdiction must make a *prima facie* showing of personal jurisdiction in order to survive the motion to dismiss. *State ex rel. Bell Atlantic-West Virginia, Inc., v. Ranson*, 201 W. Va. 402, 497 S.E.2d 755 (1997) at Syl. Pt. 1. The plaintiff must assert



more than bare allegations of jurisdictional facts in response to a motion to dismiss for lack of personal jurisdiction. *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E.2d 579 (1998). In this regard, the Petitioner did not, in response to the motion to dismiss, allege sufficient facts to survive the motion.

Petitioner, in its Memorandum of Law in Support of Petition for Writ of Prohibition, acknowledges that the resolution of the question of jurisdiction over a non-resident defendant is a two-step process, as set forth in *Abbott*; however, Petitioner then attempts to rely on an unreported opinion from the United States District Court in the Southern District of West Virginia, *Pascocciello v. Interboro School District*, 2005 WL 2994296 (S.D. W. Va. Nov. 8, 2005), in which that court concluded that it was unnecessary to determine whether the actions of the defendant satisfy the long arm statute, but may instead consider only the due process issue in a personal jurisdiction analysis. This position, however, has not been adopted by this Supreme Court of Appeals, and the relevant legal authority continues to require circuit courts to follow the two-step process set forth in *Abbott*.

The actions of Mr. Yancheck do not satisfy any of the requirements set forth in W. Va. Code § 56-3-33, because Mr. Yancheck does not transact, and has not transacted, business in West Virginia. In Paragraph No. 3 of the Complaint, the Petitioner alleges, "Upon information and belief, Defendant John A. Yancheck [*sic*], Esquire (hereinafter "Yancheck") is a licensed attorney in the State of Florida. Upon information and belief, and with regard to the matters at issue in this Complaint, Yancheck [*sic*] was transacting business in the State of West Virginia." See Complaint, submitted herewith as Exhibit A of the Appendix of Exhibits. However, the undisputed facts clearly established that Mr. Yancheck was not transacting business in West Virginia. As set forth in the Affidavit of John A. Yancheck, submitted in support of the motion to

dismiss, Mr. Yanchek affies that he has never transacted business in the State of West Virginia. Mr. Yanchek is not licensed to practice law in West Virginia, nor has he ever advertised his legal services in West Virginia. See Affidavit of John A. Yanchek, submitted herewith as Exhibit C of the Appendix of Exhibits. Ironically, the basis of the claim alleged against Mr. Yanchek was that Mr. Yanchek did not get admitted to practice law in West Virginia and did not file a claim in the West Virginia court system—essentially a *failure* to transact business in West Virginia. There is no factual evidence to support a finding of *in personam* jurisdiction under W. Va. Code § 56-3-33.

Petitioner cites *Harman v. Pauley*, 522 F. Supp. 1130, 1135 (S.D. W. Va. 1981), stating that, if the activity undertaken by the nonresident was one from which the nonresident could or should expect to derive a profit, such is sufficient to conclude that the nonresident was transacting business in West Virginia. However, the court also indicated that the “activity must be purposeful.” *Id.* In that case, the court concluded,

Given the above interpretation, defendant Pauley can be said to have transacted business within the state of West Virginia. After consulting others for advice, she **purposefully filed a claim** for property located **in West Virginia** . . . with a commissioner of accounts in West Virginia. She did so with the knowledge that, if her claim were successful, she would benefit from her activity.

*Id.* (emphasis added). In that case, the court determined that there was personal jurisdiction over the defendant as a result of her purposeful and affirmative action of filing a claim in the State of West Virginia. That affirmative action of filing a claim in West Virginia is what distinguishes *Harman* from this matter. In this case, Petitioner’s claim against Mr. Yanchek is premised upon an alleged failure to file a claim in West Virginia by an attorney who is not licensed to practice law in West Virginia. Petitioner’s claim is, in essence, an alleged failure to transact business in

West Virginia. There is simply no law to support the proposition that these acts of omission constitute transacting business in the State of West Virginia.

Furthermore, the affirmative act that occurred in *Harman* took place in West Virginia, whereas, in this case, no actions by Mr. Yanchek were directed to or occurred in West Virginia. Although the alleged injury, if any, may have occurred in West Virginia, that alone is insufficient to satisfy the long arm statute when the act occurred in another jurisdiction. Pursuant to W. Va. Code § 56-3-33(a)(3), the long arm statute will apply where one causes “tortious injury by act or omission in this state.” However, W. Va. Code § 56-3-33(a)(4) provides an additional requirement for the injury-in-this-state analysis, indicating that the long arm statute will apply when “causing tortious injury in this state by an act or omission outside this state [only] **if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.**” W. Va. Code § 56-3-33(a)(4)(2008)(emphasis added). Clearly, the mere occurrence of an injury in this state is insufficient to satisfy the statute where the acts causing the injury originate from some other jurisdiction. More is required. In this case, the acts or omissions by Mr. Yanchek of which the Petitioner complains originated in Florida—the state in which he was licensed to practice law. Therefore, for the long arm statute to apply to Mr. Yanchek, the second portion of W. Va. Code § 56-3-33(a)(4) must be satisfied. However, there is no evidence or allegation that Mr. Yanchek regularly does or solicits business in West Virginia, that he engages in some other persistent course of conduct, or that he derives substantial revenue from services rendered in West Virginia. Because there is no evidence or allegations to establish that Mr. Yanchek regularly engaged in business in or derived substantial revenue from West Virginia, the

requirements of W. Va. Code § 56-3-33(a)(4) cannot be established and thus does not invoke the application of the long arm statute.

Because of Petitioner's reliance on *Pascocciello*, Petitioner argues only that Mr. Yanchek had sufficient minimum contact with West Virginia to satisfy due process. Petitioner arrives at this conclusion by rationalizing that, *if* Mr. Yanchek had been admitted to practice in West Virginia and *if* Mr. Yanchek had filed suit in West Virginia, then Mr. Yanchek could have availed himself of the benefits and privileges of this State. In support of its position, Petitioner references a letter from Mr. Yanchek solicited by Petitioner's attorney and an affidavit prepared by a co-defendant during the pending civil action; however, applying the rationale provided by this Court in *Savarese v. Allstate Insurance Company*, 2008 WL 4386835 (W. Va. Sept. 26, 2008), these documents are insufficient to establish that Mr. Yanchek had sufficient minimum contacts with West Virginia to comport with due process.

In *Savarese*, this Court discussed a related issue concerning whether certain actions by a defendant were sufficient to establish venue. In that case, the appellant argued that communications directed by the appellee into the jurisdiction were sufficient to properly establish venue and jurisdiction. However, the communications sent by the appellee into the jurisdiction were essentially letters solicited by the appellant's attorney. At the Court stated,

We agree with the circuit court that a finding that the attorney's physical location is sufficient to satisfy the requirements of W. Va. § 56-1-1(c) would subject a defendant to claims in whatever venue in which a plaintiff decides to retain an attorney, regardless of the venue's connection to the claim itself.

*Savarese* at \*10. Using this rationale, the one letter sent by Mr. Yanchek after receiving a request for information from Petitioner's attorney in West Virginia cannot be used to support the proposition that Mr. Yanchek had sufficient minimum contacts to comport with due process.

Furthermore, the contents of the letter indicate that Mr. Yanchek was not admitted to practice law in West Virginia and that no suits were filed, which further illustrates that Mr. Yanchek neither transacted business nor had sufficient minimum contacts with West Virginia to satisfy due process. Likewise, an affidavit prepared by a co-defendant in the course of the same litigation in which the co-defendant had made a cross-claim against Mr. Yanchek cannot be used to support the proposition that Mr. Yanchek either transacted business in or had sufficient minimum contacts with West Virginia. Furthermore, in the affidavit, the co-defendant acknowledges that Mr. Yanchek could not practice law in West Virginia and that no lawsuits were instituted in West Virginia.

When analyzing whether Mr. Yanchek had sufficient minimum contacts with West Virginia to satisfy due process, the issue is not what Mr. Yanchek *could* have done, rather the issue is what actions were actually taken by Mr. Yanchek to derive benefit from this State. The facts, construed in the light most favorable to the Petitioner, clearly indicate that Mr. Yanchek did not attempt to derive benefit from this State. He was not and is not licensed to practice law in West Virginia. He did not initiate any suits in West Virginia. Should his failure to be admitted and to initiate suits in West Virginia be viewed as omissions, such omissions do not satisfy the due process "minimum contacts" requirement. To conclude as such would subject an attorney to jurisdiction in every state in the United States.

## II.

**THIS COURT SHOULD REFRAIN FROM ISSUING A WRIT OF PROHIBITION BECAUSE THE REMEDY SOUGHT IS NOT AN APPROPRIATE REMEDY TO CHALLENGE THE ALLEGED ERRORS OF THE TRIAL COURT.**

Remedies of the nature of an extraordinary writ are "generally 'reserved for really extraordinary causes.'" *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 345, 480 S.E.2d 548,

554 (1996)(quoted in *State ex rel. Brooks v. Zakaib*, 214 W. Va. 253, 259, 588 S.E.2d 418, 424 (2003)). Accordingly, a writ of prohibition may lie only as a matter of right in cases in which the lower court, having jurisdiction, exceeds its legitimate powers. W. Va. Code § 53-1-1 (2008). However, prohibition is only used to correct substantial, clear-cut, legal errors which are plainly in contravention to a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial court will be completely reversed if the error is not corrected. *State ex rel. Charleston Mail Association v. Ranson*, 200 W. Va. 5, 488 S.E.2d 5 (1997). As will be demonstrated herein, Petitioner fails to meet the standard for issuance of an extraordinary writ and has waived the appropriate remedy available to it by failing to file a petition for appeal within four (4) months of the entry of the order dismissing John A. Yancheck from Civil Action No. 07-C-517-2.

A review of the opinions of the West Virginia Supreme Court of Appeals fails to reveal any case law concerning the propriety of a writ of prohibition to challenge a lower court's dismissal of a civil defendant for lack of *in personam* jurisdiction. To the contrary, the majority of the cases involve the situation wherein a lower court denies a motion to dismiss finding that there is *in personam* jurisdiction over the defendant. Thereafter, the defendant who remains in the civil action seeks a writ of prohibition, because there is no other remedy available to the defendant at that time. To the contrary, the facts presented by this present matter pose a different scenario which illustrates why a writ of prohibition does not apply when a defendant is dismissed from a civil action for lack of personal jurisdiction.

As Justice Cleckley stated in his concurrence in *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 37, 454 S.E.2d 77, 82 (1994) (emphasis added),

**Mere doubt as to the correctness of a trial court's ruling on a motion *in limine* regarding an evidentiary issue is an insufficient basis to invoke this Court's writ power. To justify this extraordinary remedy, petitioner has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy. Thus, writs of prohibition, as well as writs of mandamus and habeas corpus, should not be permitted when the error is correctable on appeal.**

In his concurrence, Justice Cleckley expressed his concern for the abuse of the use of writs of prohibition when other remedies, such as petitions for appeal, are available to a party. Justice Cleckley then proceeded to identify five (5) factors that must be considered to determine if a writ of prohibition is appropriate. Those five (5) factors were later adopted by this Supreme Court in Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

The first factor to consider where it is claimed that the lower court exceeded its legitimate powers is whether the party seeking the writ has no other adequate means to obtain the desired relief. *State ex rel. Hoover*, at Syl. Pt. 4. By order, dated November 17, 2007, Respondent Yancheck was dismissed from Civil Action No. 07-C-517-2. That order was a final order from which Petitioner could have submitted a petition for appeal but failed to do so. As the Petitioner cites in its Memorandum of Law in Support of Petition for Writ of Prohibition, "[w]here prohibition is sought to restrain a trial court for the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court should review each case on its own particular facts to determine whether a **remedy by appeal is both available and adequate.**" Syl. Pt. 2, *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 12 (1996)(emphasis added). Moreover, as Justice Cleckley previously indicated, "we should not allow a writ of prohibition as a substitute for an appeal." *State ex rel. Allen*, 193 W. Va. at FN1, 454 S.E.2d at FN1 (Cleckley, F., concurring).

With regard to this present matter, an appeal was available following the entry of the November 17, 2007, order; however, Petitioner neglected to file such petition. Clearly, Petitioner's own failure to file a petition for appeal within four (4) months following the final order dismissing Mr. Yancheck cannot now be cited to support an argument that an appeal is not available. It is not available because of the Petitioner's own lack of diligence. A second remedy remains for Petitioner—Petitioner could file its claim against Respondent in a jurisdiction in which personal jurisdiction could be properly asserted over him. Because Petitioner had an opportunity to file a petition for appeal and because Petitioner could file his claim against Respondent in another jurisdiction having personal jurisdiction over Respondent, Petitioner clearly has had and still has other remedies available to it.

A second factor to be considered is whether the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal. *State ex rel. Hoover*, at Syl. Pt. 4. As explained above, Petitioner had four (4) months to file a petition for appeal following the entry of the order dismissing Mr. Yancheck. Any proposed damage or prejudice obviously could have been addressed by this Supreme Court of Appeals had such a petition been filed. Furthermore, a brief survey of the opinions by the West Virginia Supreme Court of Appeals illustrates that this Court has granted petitions for appeal in which a lower court had dismissed a defendant for lack of personal jurisdiction, and reversed the issue on appeal. *See, e.g., Griffith & Coe Advertising, Inc. v. Farmer & Merchants Bank and Trust*, 215 W.Va. 428, 599 S.E.2d 851 (2004). Had Petitioner filed an appeal within the appropriate time frame, any alleged damage or prejudice could have been addressed by this Court on appeal.

The third factor to be considered is whether the lower court's order is clearly erroneous as a matter of law. *State ex rel. Hoover*, at Syl. Pt. 4. Although Petitioner asserts that the lower



court's order is clearly erroneous as a matter of law, in concluding that the facts presented to the trial court failed to establish that the Respondent transacted business in the State of West Virginia, the Circuit Court of Harrison County reviewed the allegations made by all parties and determined that the allegations, when construed in the light most favorable to Petitioner, supported its conclusion that there was no evidence that Respondent transacted business in this state. As this Court has stated,

[T]his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and **only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.**

Syl. Pt. 1, in part, *State ex rel. DeFrances v. Bedell*, 191 W.Va. 513, 446 S.E.2d 906 (1994), quoting Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979) (emphasis added). This matter does not involve the factual scenario in which a trial would be reversed if the alleged error is not corrected. Most importantly, more than (4) months has passed since the entry of the order dismissing Respondent Yanchek, during which time the Petitioner could have filed a petition for appeal. During the nine (9) months since the dismissal of Respondent Yanchek, Petitioner has continued to pursue its claim against Gulf Coast Collection Bureau, Inc., the original co-defendant in the matter below, and the party with which the Petitioner originally contracted. The dismissal of Respondent Yanchek has not impacted the Petitioner's ability to pursue its claim and would not result in the reversal of any verdict reached by a jury.

The fourth and fifth factors are not entirely relevant for purposes of the matter presently before the Court. There is no claim by Petitioner that this is an oft-repeated error by the trial court. Furthermore, *in personam* jurisdiction is an issue in every civil action, and the lower

court's ruling on a motion to dismiss for lack of *in personam* jurisdiction does not raise new and important problems or issues of law of first impression.

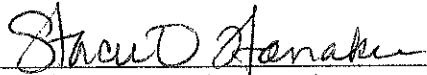
Finally, on November 17, 2007, Defendant Yanchek was dismissed from the on-going civil action. Since Defendant Yanchek's dismissal, the parties below have had nine (9) months to conduct discovery and otherwise prepare this matter for trial. Petitioner was aware of Defendant Yanchek's dismissal from this matter as it was served a copy of the dismissal order. This request for a writ of prohibition, filed more than nine (9) months after the entry of the order that it seeks to challenge, is untimely filed.

### **CONCLUSION**

Petitioner presently seeks an inappropriate remedy after permitting the time frame for which an appeal could have been filed to expire. A petition for appeal was the appropriate remedy which Petitioner should have sought. As this Court has previously acknowledged, and as has been discussed at length herein, a writ of prohibition is not a mere substitute for an appeal. A remedy for Petitioner was available in the form of a petition for appeal, and a remedy remains in the form of filing the action with a court having personal jurisdiction over Respondent. Petitioner cannot satisfy the standard for issuance of this extraordinary writ. Furthermore, the Circuit Court of Harrison County properly concluded that it did not have *in personam* jurisdiction over Mr. Yanchek because Mr. Yanchek did not transact business in West Virginia and did not make sufficient minimum contacts with West Virginia to satisfy due process.

For the reasons set forth above, the Respondent, John A. Yanchek, prays that this Court decline to issue a Writ of Prohibition Petition together with such other and further relief as this Supreme Court of Appeals may deem proper.

**JOHN A. YANCHEK  
BY COUNSEL**



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JUDGE OF THE CIRCUIT COURT OF  
HARRISON COUNTY, WEST VIRGINIA  
and JOHN A. YANCHEK [sic], ESQUIRE,**

**Respondents.**

**CERTIFICATE OF SERVICE**


I, Stacie D. Honaker, hereby certify that on the 16th day of October, 2008, I served a true copy of the foregoing **"RESPONSE OF JOHN A. YANCHEK TO RULE TO SHOW CAUSE"** upon all counsel of record by depositing a true copy thereof in the United States mail, postage pre-paid, in envelopes addressed as follows:

Michael D. Crim, Esquire  
Debra T. Herron, Esquire  
Natalie A. Givan, Esquire  
McNeer, Highland, McMunn and Varner, L.C.  
400 W. Main Street, 4<sup>th</sup> Floor  
Clarksburg, WV 26301  
**Counsel for Petitioner**

Charles G. Johnson, Esquire  
Jackson Kelly, PLLC  
P.O. Box 150  
Clarksburg, WV 26302  
**Counsel for Gulf Coast Collection Bureau, Inc.**

Honorable Thomas A. Bedell  
Circuit Court of Harrison County  
Harrison County Courthouse  
301 W. Main Street  
Clarksburg, WV 26301

Joseph Shaffer, Esquire  
Prosecuting Attorney for Harrison County  
Harrison County Courthouse  
301 W. Main Street  
Clarksburg, WV 26301

  
\_\_\_\_\_  
Stacie D. Honaker, Esquire  
West Virginia Bar No. 9675

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**WEST VIRGINIA NATIONAL AUTO  
INSURANCE COMPANY, INC.,**

**Petitioner,**

**vs.**

**Upon Original Jurisdiction  
In Prohibition,  
No. 081711**

**THE HONORABLE THOMAS A. BEDELL,  
JUDGE OF THE CIRCUIT COURT OF  
HARRISON COUNTY, WEST VIRGINIA,  
and JOHN A. YANCHEK [sic], ESQUIRE,**

**Respondents.**

**APPENDIX OF EXHIBITS**

- A. Complaint
- B. Correspondence dated March 30, 2007 to Attorney Crim from John Yancheck
- C. Affidavit of John A. Yancheck

**JOHN A. YANCHEK  
BY COUNSEL**



Stephen R. Brooks, Esquire  
West Virginia Bar No. 472  
Stacie D. Honaker, Esquire  
West Virginia Bar No. 9675  
Flaherty, Sensabaugh & Bonasso, P.L.L.C.  
965 Hartman Road, Suite 1105  
Morgantown, WV 26505  
Telephone: (304) 598-0788  
Telecopier: (304) 598-0790

**IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA****WEST VIRGINIA NATIONAL  
AUTO INSURANCE COMPANY, INC.,****Plaintiff,****v.****Case Number:** 07-C-517**GULF COAST COLLECTION BUREAU, INC.  
and JOHN A. YANCHECK, ESQUIRE,****Defendants.****COMPLAINT**

COMES NOW the Plaintiff, West Virginia National Auto Insurance Company (hereinafter "West Virginia National"), by and through its counsel, Michael D. Crim, Natalie A. Givan, and the law firm of McNeer, Highland, McMunn and Varner, L.C., and for its Complaint alleges the following:

1. The Plaintiff, West Virginia National, is a West Virginia corporation with its principle place of business located in West Virginia. At all times relevant herein, West Virginia National has been authorized to transact business and has been actively engaged in the insurance business in the State of West Virginia.

2. Upon information and belief, Defendant Gulf Coast Collection Bureau, Inc. (hereinafter "GCCB") is a Florida corporation engaged in the practice of debt collection. GCCB conducts business in and throughout the State of West Virginia, including Harrison County.

3. Upon information and belief, Defendant John A. Yancheck, Esquire (hereinafter "Yancheck") is a licensed attorney in the State of Florida. Upon information and belief, and with regard to the matters at issue in this Complaint, Yancheck was transacting business in the State of West Virginia.



**Factual Basis of the Complaint**

4. West Virginia National realleges, as though set forth fully herein, paragraphs 1 through 3 of this Complaint.

5. In or about November 2003, West Virginia National entered into an oral agreement with GCCB whereby West Virginia National began placing accounts with GCCB for collection.

6. Over the next three and one-half (3 ½) years, West Virginia National forwarded at least sixty-nine (69) accounts to GCCB for collection.

7. The sixty-nine (69) accounts forwarded by West Virginia National to GCCB had a value of five hundred seventy-nine thousand fifty-eight dollars and forty-eight cents (\$579,058.48).

8. Throughout the duration of their relationship, and according to GCCB's own records, it has collected a total of ten thousand eighty-nine dollars and sixty cents (\$10,089.60).

9. Of the sixty-nine (69) accounts forwarded by West Virginia National, GCCB forwarded approximately thirteen (13) to Defendant Yancheck for the purpose of initiating suit against the debtors.

10. The thirteen (13) accounts forwarded to Defendant Yancheck had a value of one hundred seventy-one thousand six hundred forty-five dollars and eighteen cents (\$171,645.18).

11. With regard to nine (9) of the accounts forwarded to Defendant Yancheck, West Virginia National forwarded suit filing fees in excess of two thousand two hundred fifty dollars (\$2,250.00). These funds were delivered by West Virginia National to GCCB, and GCCB forwarded the same to Defendant Yancheck.

12. Despite accepting the suit filing fees, and despite his obligation to initiate suit in those matters forwarded to him, Defendant Yancheck failed to file a single civil action.

13. On or about May 2, 2007, the contract between West Virginia National and GCCB



was terminated by West Virginia National.

14. At the time of the termination of the agreement, GCCB had allowed the statute of limitations to run on forty-five (45) of the aforementioned sixty-nine (69) accounts which West Virginia National had forwarded to it for collection.

15. According to GCCB's own records, the forty-five (45) accounts had a value of five hundred fifteen thousand eight hundred twenty-six dollars and thirty-eight cents (\$515,826.38).

16. Moreover, at the time West Virginia National terminated the agreement with GCCB, the statute of limitations had run on eleven (11) of the thirteen (13) accounts forwarded to Defendant Yancheck. These eleven (11) accounts had a value of one hundred sixty-four thousand one hundred twenty-three dollars and sixteen cents (\$164,123.16).

**Count I**  
**(Breach of Contract-GCCB)**

17. The Plaintiff, West Virginia National, realleges, as above set forth in paragraphs 1 through 16 of this Complaint.

18. The acts and conduct of GCCB as alleged herein above constituted a breach of contract.

19. West Virginia National has been injured and damaged as a direct and proximate result of GCCB's breach of contract.

**Count II**  
**(Fraud/Misrepresentation-GCCB)**

20. West Virginia National, realleges, as though set forth fully herein, paragraphs 1 through 19 of this Complaint.

21. GCCB represented to West Virginia National that it would collect amounts due and owing on the sixty-nine (69) accounts forwarded to it by West Virginia National.

22. GCCB represented that it would employ commercially reasonable conduct in attempting to collect monies due and owing to West Virginia National.

23. West Virginia National relied on GCCB's representations.

24. The representations made by GCCB were material and false.

25. West Virginia National has been injured and damaged as a direct and proximate result of its reliance upon the false representations made by GCCB.

**Count III**  
**(Breach of Fiduciary Duty-GCCB)**

26. The Plaintiff, West Virginia National, realleges, as though set forth fully herein, paragraphs 1 through 25 of this Complaint.

27. GCCB owed a fiduciary duty to West Virginia National with regard to the collection of amounts due and owing on the sixty-nine (69) accounts forwarded to it for collection.

28. GCCB breached its fiduciary obligation to West Virginia National by failing to employ commercially reasonable conduct in its collection efforts.

29. GCCB further breached its fiduciary obligations to West Virginia National by forwarding accounts to Defendant Yancheck to institute lawsuits against West Virginia debtors when Defendant Yancheck did not have a license to practice law in West Virginia.

30. GCCB further breached its fiduciary obligations to West Virginia National by failing to supervise and monitor those accounts which it forwarded to Defendant Yancheck.

31. West Virginia National has been injured and damaged as a direct and proximate result of GCCB's breach of fiduciary obligations.

**Count IV**  
**(Legal Malpractice-Yancheck)**

32. The Plaintiff, West Virginia National, realleges, as though set forth fully herein,

paragraphs 1 through 31 of this Complaint.

33. An attorney-client relationship was created between West Virginia National and Defendant Yancheck.

34. Despite payment to Defendant Yancheck in excess of two thousand two hundred fifty dollars (\$2,250.00) for court filing fees, Defendant Yancheck failed to initiate a single lawsuit.

35. Defendant Yancheck allowed the statute of limitations to run on eleven (11) of the thirteen (13) accounts forwarded to him by GCCB without initiating a lawsuit.

36. The actions and conduct of Defendant Yancheck failed to conform to the applicable standard of care for an attorney involved in civil litigation.

37. West Virginia National was injured and damaged as a direct and proximate result of Defendant Yancheck's legal negligence.

#### Count V

(Breach of Fiduciary Duty-Yancheck)

38. West Virginia National realleges, as though set forth fully herein, paragraphs 1 through 37 of this Complaint.

39. Defendant Yancheck owed a fiduciary duty to West Virginia National with regard to his representation of West Virginia National in the collection of amounts due and owing to West Virginia National on the thirteen (13) accounts forwarded to him for the filing of lawsuits.

40. Defendant Yancheck breached his fiduciary duty to West Virginia National by failing to institute suit and collect amounts due and owing on the thirteen (13) accounts entrusted to him.

41. West Virginia National has been injured and damaged as a direct and proximate result of Defendant Yancheck's breach of fiduciary obligations.

#### Count VI

(Conversion-Yancheck)

42. West Virginia National, realleges, as though set forth fully herein, paragraphs 1 through 41 of this Complaint.

43. Defendant Yancheck has converted to his own use those funds which were paid to him by or on behalf of West Virginia National for the purpose of instituting lawsuits on the various accounts forwarded to him for collection.

44. Such wrongful exertion of dominion over the funds belonging to West Virginia National was a denial of West Virginia National's rights and was inconsistent therewith.

45. West Virginia National has been injured and damaged as a direct and proximate result of Defendant Yancheck's conversion of its funds.

**WHEREFORE,** as a result of the conduct of the foregoing Defendants, Plaintiff West Virginia National seeks recovery from the Defendants, jointly and severally, for their conduct which caused, or contributed to, the damages suffered by West Virginia National including, but not limited to:

- (a) Compensatory and general damages in the amount necessary to compensate the Plaintiffs for its injuries;
- (b) Punitive damages;
- (c) Prejudgment and post-judgment interest at the maximum legal rate;
- (d) Costs and expenses including attorneys' fees; and
- (e) Such other further general and specific relief as may be appropriate as this action matures.

Dated this the 23 day of August, 2007.

**PLAINTIFF, WEST VIRGINIA  
NATIONAL INSURANCE COMPANY,  
INC., BY COUNSEL:**

  
Michael D. Crim

(WV State Bar #7058)

Natalie A. Givan

(WV State Bar #9567)

400 West Main Street, Fourth Floor

P. O. Drawer 2040

Clarksburg, WV 26302-2040

Telephone: (304) 626-1100

Facsimile: (304) 623-3035

McNeer, Highland, McMunn and Varner, L.C.  
Of Counsel

JOHN A. YANCHEK, P.A.  
ATTORNEY AT LAW

2 North Tamiami Trail, Suite 308  
Sarasota, Florida 34236  
Telephone (941) 366-7177  
Facsimile (941) 955-0131  
E-Mail: JAYLAW@MSN.COM

March 30, 2007

Via Facsimile (304) 626-1100

Michael D Crim, Esquire  
McNeer Highland McMunn & Varner  
P.O. Drawer 2040  
Clarksburg, WV 26302-2040

Re: Subrogation files for West Virginia National Auto Insurance ("WVNA")

Dear Mr Crim:

We are writing to respond to your request for a status on several files regarding the above referenced matter.

According to our records, we were referred the following claims:

WVNA v Joshua Justice  
WVNA v Alicia Dixon  
WVNA v Deana Ramsey  
WVNA v James Hiroiskey  
WVNA v Anthony McLain  
WVNA v Amy Tomblin  
WVNA v Paul Simmons  
WVNA v Michael Bundy

We received \$300.00 for the filing fees and court costs on each of these files. We were never able to get admitted pro hoc vice to file suits. Thus, no suits have been filed. The monies remain in our trust account and will be returned.

Very Truly Yours,

John A. Yancheck, P.A.

*John A. Yancheck*  
John A. Yancheck



**IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA**

**WEST VIRGINIA NATIONAL AUTO  
INSURANCE COMPANY, INC.,**

**Plaintiff,**

**vs.**

**CIVIL ACTION NO. 07-C-517  
Judge Thomas A. Bedell**

**GULF COAST COLLECTION BUREAU,  
INC., and JOHN A. YANCHEK,**

**Defendants.**

**AFFIDAVIT OF JOHN A. YANCHEK.**

On the 27<sup>th</sup> day of September, 2007, John A. Yanchek personally appeared before the undersigned, a notary public in and for the said county and state aforesaid, who, being first duly sworn, upon his/her oath deposes and says:

1. This affidavit has been prepared in support of the "Motion to Dismiss Complaint Against John A. Yanchek."
2. The facts set forth herein are those to which I would testify in person if called upon to do so before this Court at any hearing or trial which is or may be scheduled.
4. I am familiar with the facts and circumstances that gave rise to this civil action, and the allegations contained in the Complaint filed against me.
5. I am an attorney licensed to practice law in the State of Florida.
6. I do not hold, nor have I ever held a license to practice law in the State of West Virginia.
7. I have never been admitted Pro Hac Vice to practice law in the State of West Virginia, nor have I advertised legal services in the State of West Virginia.



8. For purposes of the allegations contained in the Complaint that I was transacting business in the State of West Virginia, I hereby state that I have not

- a. Transacted any business in the State of West Virginia;
- b. Contracted to supply services or things in the State of West Virginia;
- c. Caused tortious injury by an act or omission in the State of West Virginia;
- d. Caused tortious injury in the State of West Virginia by an act or omission outside this state and do not regularly solicit business, or engage in any other persistent course of conduct, or derive substantial revenue from goods used or consumed or services rendered in the State of West Virginia;
- e. Caused injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside the State of West Virginia with an expectation that such person would use, consume or be affected by the goods in the State of West Virginia;
- f. Have an interest in, use or possess real property in the State of West Virginia; and
- g. Contracted to insure any person, property or risk located within the State of West Virginia at the time of contracting.

9. I never had any direct contact or communications with the plaintiff.

10. To the best of my knowledge, the only contact I have even had with regard to the State of West Virginia is limited to an occasion where I may have driven through a portion of the state while traveling to another destination.

and further the affiant sayeth naught.

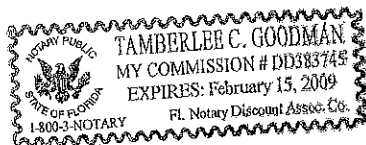


John A. Yancheck  
John A. Yancheck

STATE OF Florida  
COUNTY OF Sarasota, to-wit:

The following instrument was acknowledged before me this 27<sup>th</sup> day of September 2007, by John A. Yancheck.

My commission expires: \_\_\_\_\_.



Tamberlee C. Goodman  
NOTARY PUBLIC

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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JUDGE OF THE CIRCUIT COURT OF  
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and JOHN A. YANCHECK [sic], ESQUIRE,**

**Respondents.**

**CERTIFICATE OF SERVICE**


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